A

Hardin & Sons Sdn Bhd v Kho Ah Mai (f)

B HIGH COURT (SIBU) — ORIGINATING SUMMONS NO SBW-24–15/3 OF 2015
LEE HENG CHEONG J
16 NOVEMBER 2015

C *Land Law — Caveat — Application to remove caveat — Whether defendant had caveatable interest in property — Whether defendant derived interest from registered proprietor of property — Whether caveat failed to state with specific certainty nature of estate or interest claimed — Whether caveat null and void*

D On 24 December 2012, the defendant lodged a caveat against a property situated in the Sibu Town District ('the property') on the grounds that she had a caveatable interest in the property. In her statutory declaration filed in support of her application to lodge a caveat the defendant claimed that her caveatable interest was derived from one William Hardin ('Hardin'), who was E the owner of the property. The defendant averred that Hardin had invited her husband and her to live on the ground floor of a building on the property ('the building') for as long as they liked. The defendant claimed that based on this offer she and her late husband had spent a total sum of RM500,000 to make F the ground floor of the building habitable for their family. The defendant further averred that when the plaintiff company acquired the property in 1984 it had never raised any objection to the defendant's occupation of the ground floor of the building. The plaintiff claimed that the defendant's averments in the statutory declaration were erroneous in that it was the plaintiff company G that was the registered proprietor of the property at all material times. The plaintiff adduced a memorandum of transfer to prove that the property had been transferred to the plaintiff company for a consideration of RM200,000 in 22 November 1977 and not in 1984 as alleged by the defendant. Consequently, the plaintiff filed the present application for an order to remove H the caveat and for an assessment of damages as well as costs. The defendant filed various affidavits opposing this application.

Held, allowing the plaintiff's application with costs:

I (1) It is trite that where an application was made by the registered proprietor, the onus was on the defendant as the caveator to prove that she had a caveatable interest. As Hardin and the plaintiff company were two separate entities, any representation made by the late Hardin to the defendant or her late husband should not bind the plaintiff company unless the defendant could prove that Hardin was acting on behalf of the

plaintiff. However, the defendant had failed or omitted to show evidence of this. Instead the defendant had contended that the registered proprietor of the land at the material time was the late Hardin when in fact he was not. In the circumstances, the defendant had failed to prove the grounds stated in her SD, that she had derived her estate or interest from the plaintiff who was the actual registered proprietor of the property. In addition, the defendant had failed to state with specific certainty the nature of the estate or interest claimed by her against the plaintiff or Hardin (see paras 8–9 & 13–14).

(2) The grounds stated in the defendant's affidavits opposing the plaintiff's application were not the same grounds stated in the statutory declaration affirmed in support of her application for the caveat. Thus, the defendant was not allowed to rely on these 'new' grounds. In any event, these 'new' grounds were bare allegations, equivocal and lacking in precision (see paras 11–12 & 23).

(3) Further, from the contents of the SD, the defendant's purported interest in the property, if any, was confined to the ground floor of the building on the property. However, the defendant had caveated the whole property without limiting the effect of the caveat to protect the part of the property, which she alleged she was entitled to, namely the ground floor of the building on the property. Although the defendant was not claiming estate or interest in the whole of the property, which also consisted of the first and second floors of the building, she had caveated the whole of the property. The caveat was thus null and void. Since the caveat was null and void, it was clear that the defendant had failed to prove that she had a caveatable interest in the property (see paras 16–18 & 22–23).

(4) The contentions of the defendant as contained in the SD and the various affidavits filed were without merit and mala fide. Her contentions that she and her husband had spent a total sum of RM500,000 to make the ground floor of the building habitable for their family was a bare statement without any documentary evidence of any kind in support (see para 23).

[Bahasa Malaysia summary

Pada 24 Disember 2012, defendan memasukkan kaveat terhadap hartanah yang terletak di Daerah Bandar Sibu ('hartanah tersebut') atas alasan bahawa dia mempunyai kepentingan yang boleh dikaveatkan dalam hartanah tersebut. Dalam deklarasi statutorinya ('DS') yang difailkan dalam menyokong permohonannya untuk memasukkan kaveat, defendan mendakwa bahawa kepentingan yang boleh dikaveatkan adalah berpunca daripada seorang yang bernama ('Hardin'), yang mana adalah pemilik hartanah tersebut. Defendan berhujah bahawa Hardin telah menjemput suaminya dan dia untuk tinggal di tingkat pertama bangunan di atas hartanah tersebut ('bangunan') untuk selama

mana yang mereka suka. Defendan mendakwa bahawa berdasarkan tawaran ini dia dan mendiang suaminya telah membelanja sejumlah RM500,000 untuk menjadikan tingkat bawah bangunan tersebut boleh didiami oleh keluarga mereka. Defendan selanjutnya berhujah bahawa semasa plaintif membeli hartanah tersebut pada tahun 1984 ia tidak pernah membangkitkan apa-apa bantahan kepada penghunian defendan di tingkat bawah bangunan tersebut. Plaintif mendakwa bahawa hujahan defendan di dalam DS adalah silap yang mana plaintif adalah pemilik berdaftar hartanah tersebut pada kesemua masa. Plaintif mengemukakan memorandum pemindahan untuk membuktikan bahawa hartanah tersebut telah dipindahkan kepada plaintif untuk balasan sebanyak RM200,000 pada 22 November 1977 dan bukan pada tahun 1984 seperti yang didakwa oleh defendan. Akibatnya, plaintif memfailkan permohonan ini untuk perintah mengeluarkan kaveat dan bagi taksiran ganti rugi dan juga kos. Defendan memfailkan pelbagai afidavit dalam membantah permohonan ini.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Ia adalah nyata bahawa di mana permohonan dibuat oleh pemilik berdaftar, beban adalah ke atas defendan kerana pengkaveat perlu membuktikan bahawa dia mempunyai kepentingan yang boleh dikaveatkan. Memandangkan Hardin dan plaintif adalah dua entiti yang berasingan, apa-apa representasi yang dibuat oleh mendiang Hardin kepada defendan mendiang suaminya tidak patut mengikat plaintif kecuali defendan dapat membuktikan yang Hardin bertindak bagi pihak plaintif. Walau bagaimanapun, defendan telah gagal atau tertinggal untuk menunjukkan keterangan ini. Sebaliknya defendan telah berhujah bahawa pemilik berdaftar tanah pada masa material adalah mendiang Hardin tetapi sebenarnya bukan dia. Dalam keadaan ini, defendan gagal untuk membuktikan alasan-alasan yang dinyatakan di dalam DSnya, bahawa dia memperoleh estet atau kepentingannya daripada plaintif pemilik berdaftar sebenar hartanah tersebut. Dalam tambahan, defendan telah gagal untuk menyatakan dengan kepastian spesifik sifat estet atau kepentingan yang didakwa olehnya terhadap plaintif atau Hardin (lihat perenggan 8–9 & 13–14).

(2) Alasan-alasan yang dinyatakan di dalam afidavit defendan yang membantah permohonan plaintif bukan alasan yang sama yang dinyatakan di dalam DS yang mengesahkan dalam menyokong permohonannya untuk kaveat. Oleh itu, defendan tidak dibenarkan untuk bergantung ke atas alasan-alasan 'new' ini. Walau bagaimanapun, alasan-alasan 'new' ini adalah dakwaan kosong, sukar difahami dan kurang tepat (lihat perenggan 11–12 & 23).

(3) Selanjutnya, daripada is kandungan DS, kepentingan yang dimaksudkan defendan di dalam hartanah tersebut, jika ada, terhad kepada tingkat

bawah bangunan di atas hartanah tersebut. Walau bagaimanapun, defendan telah mengkaveatkan keseluruhan hartanah tanpa mengehadkan kesan kaveat untuk melindungi bahagian hartanah tersebut, yang mana dia dakwa berhak kepadanya, iaitu tingkat bawah bangunan atas hartanah tersebut. Walaupun defendan tidak menuntut estet atau kepentingan di dalam keseluruhan hartanah tersebut, yang mana juga termasuk tingkat pertama dan kedua bangunan tersebut, dia telah mengkaveatkan keseluruhan hartanah. Kaveat oleh itu adalah batal dan tak sah. Memandangkan kaveat adalah batal dan tak sah, adalah jelas bahawa defendan telah gagal untuk membuktikan yang dia mempunyai kepentingan yang boleh dikaveatkan di dalam hartanah tersebut (lihat perenggan 16–18 & 22–23).

(4) Hujahan defendan seperti yang terdapat di dalam DS dan pelbagai afidavit yang difailkan adalah tanpa merit dan mala fide. Hujahannya bahawa dia dan suaminya telah membelanja sejumlah RM500,000 untuk menjadikan tingkat bawah bangunan boleh didiami untuk keluarga mereka adalah pernyataan kosong tanpa apa-apa keterangan dokumentar dalam apa jua bentuk untuk menyokong (lihat perenggan 23).]

Notes

For cases on caveat in general, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 2698–2728.

Cases referred to

Easow Plantations Sdn Bhd v Mosbert Berhad (In Liquidation) Ranjit Singh v Jet Age Construction Sdn Bhd [1988] 1 MLJ 298, SC (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (folld)
Fung Yuk Lien v Foong Chee Sam (as administrator of the estate of Kong Muk Tei, deceased) [2000] 3 MLJ 543, HC (refd)
Goh Paik Swan v Ng Choo Lum [1996] 3 MLJ 437, CA (folld)
Law Pik Tai @ Lau Paik Tai v Wong Nyiik Foon @ Wong Nyiik Kiew (f) [2002] MLJU 263; [2002] 4 CLJ 486, HC (folld)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (folld)
N Vangedaselam v Mahadevan & Anor [1976] 2 MLJ 161, FC (refd)
Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)
Utama Merchant Bank Bhd v Cawis Wira Sdn Bhd & Ors [2006] 7 CLJ 143, HC (folld)

Legislation referred to

Land Code (Cap 81) s 174(1)
National Land Code Form 19B

Paul Tan (Tan Yap & Tang Advoctaes) for the plaintiff.
Augustine Liom (Tang & Co Advocates) for the defendant.

Lee Heng Cheong J:

INTRODUCTION

[1] The defendant has lodged a caveat vide instrument No L15497/2014 ('the said caveat') against Lot 91 Block 6 Sibu Town District ('the said property') which was registered at the Sibu Land Registry Office on 24 December 2014 on the grounds as stated in the statutory declaration of the defendant declared on the 1 December 2014 ('the said statutory declaration') in support of the application for the said caveat.

[2] In this application, the plaintiff is applying for an order to remove the said caveat and for an assessment of damages as well as costs.

THE RELEVANT PLEADINGS

[3] The relevant pleadings are as follows:

(a) originating summons dated 17 March 2015 (in encl 1) ('the OS);

(b) affidavit No 1 of Nora Hardin affirmed on 17 March 2015, encl 2 ('Nora's affidavit No 1');

(c) affidavit No 2 of Nora Hardin affirmed on 15 June 2015, encl 14 ('Nora's affidavit No 2');

(d) affidavit No 3 of Nora Hardin affirmed on 9 July 2015, encl 17 ('Nora's affidavit No 3');

(e) affidavit in opposition of Kho Ah Mai affirmed on 3 June 2015, encl 13 ('Kho's affidavit'); and

(f) affidavit in opposition No 2 of Kho Ah Mai affirmed on 3 July 2015, encl 16 ('Kho's affidavit').

RELEVANT LAWS AND PRINCIPLES

[4] It is trite that where an application is made by the registered proprietor, the onus is on the caveator to prove that he has a caveatable interest. In the present case the plaintiff is the registered proprietor of the said property and the defendant is the caveator, thus the defendant has to prove that she has a caveatable interest. This court is guided by the case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 215 where Lord Diplock stated as follows:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party. ...

[5] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, the Court of Appeal laid down a three stages approach to determine whether a caveat ought be removed in the manner as follows:

(a) the first stage is the scrutiny of the grounds stated in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then the caveat must be removed without the necessity of going any further;

(b) the second stage is when 'the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case'; and

(c) the 'third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* as 'the balance of convenience'. As the matters that got to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary'.

CONSIDERATION OF THE APPLICATION

First stage: any caveatable interest?

[6] The defendant contended that her interest is derived from one William Hardin who was the purported registered proprietor of the said property in 22 November 1977 or thereabout. The pertinent paragraphs of the defendant's said statutory declaration in support of the said caveat are as follows:

1. On 22nd November 1977, I married to my husband (Sakarno Hardin).
2. On 22nd November 1977 when we got married, Hardin (William Hardin) was then the registered proprietor of the said Property.
3. At that time, the building on the said Property consisted of only two storeys with alleviated ground floor empty without any walls.

4. Hardin asked us to live in the first floor and second floor of the said Property together with him and his wife.

5. Sometimes in 1980, Moly (hereinafter called 'Moly') came back to Sibu from Penang. She moved in and lived in the said Property. She is a sister of My Husband.

6. About a year later, Moly got married.

7. After marriage, Moly and her husband lived in the said Property. My Husband and I wanted to move out to give way to Moly and her husband. But Hardin did not all want us to move out. He offered us to exclusively live in the ground floor of the said Property as long as we liked. He asked us to put up the necessary walls, construct and complete a kitchen, bathrooms and toilets and other necessary works in order to make the ground floor habitable.

8. My Husband and I thereupon started at our costs and expenses carrying out the requisite works to the said Property in order to make it habitable. We had spent a total sum of Ringgit Malaysia five hundred thousand (RM500,000) for the work.

9. My Husband and I and our four sons had at all material times been living in the ground floor of the said Property. I am still living there after the demise of My Husband. My Husband passed away on 20th February 2009.

10. The Company ('the Plaintiff') is fully aware of the facts herein when the said Property was transferred to the Company in 1984. The Company has never raised any objection to my occupation of the said Property being transferred it to now.

[7] This court noted as follows:

(a) the defendant's averments in the said statutory declaration were essentially erroneous in the following particulars:

(i) the said William Hardin was not the registered proprietor in 22 November 1977;

(ii) the said property was transferred by the said William Hardin to the plaintiff for consideration of RM200,000 by a memorandum of transfer dated 2 August 1977 and registered on 26 August 1977 at the Sibu Land Registry Office vide instrument No L2960/1977; and

(iii) that the plaintiff is the registered proprietor since 26 August 1977 and not in the year 1984 as alleged by the defendant.

[8] It is pertinent to note that the said William Hardin and the plaintiff were two separate legal entities and it is undisputed by the defendant that on the 26 August 1977, the directors and shareholders who held equal shares of

RM1 each, were William Hardin and Michael Hardin. Thus any representation made by the said late William Hardin to the defendant's late husband and/or the defendant should not bind the plaintiff unless the defendant can prove that the said William Hardin was acting on behalf of the plaintiff. See *Salomon v A Salomon & Co Ltd* [1897] AC 22.

[9] This court also noted that the defendant has failed and/or omitted to show that the 'relationship' and representation made by the plaintiff, to her and/or her late husband. The defendant contended that the registered proprietor of the said land at the material time was the said William Hardin when in fact he was not. In fact and in truth, the plaintiff was the registered proprietor since 26 August 1977.

[10] The defendant in Kho's affidavit ('encl 13') and Kho's affidavit ('encl 16') sought to introduce and rely on the following additional grounds, not contained in the said statutory declaration, namely:

(a) it was the late William Hardin's wish that the defendant and her late husband continued to look after the said property and to see that it remains a family house for the Hardins and will not be sold;

(b) the late William Hardin was in full control of the use of the said property;

(c) the defendant has an equitable interest based on implied trust and the plaintiff held the said property in trust in particular the ground floor in trust for the defendant and her children;

(d) the defendant has a reversionary interest in the said property;

(e) the plaintiff holds the said property in trust for the rest of the Hardin's sibling;

(f) the plaintiff's right as a registered proprietor is encumbered by the trust given by William Hardin to keep the said property as a family dwelling house and that it shall not be sold; and

(g) the plaintiff holds the said property under an implied or a resulting trust for all the Hardins and that the said property shall remain the family property and it shall not be sold to any third party and the defendant and her children shall live on the ground floor.

[11] This court is in agreement with the plaintiff's contention that the 'new' grounds stated in Kho's affidavit ('encl 13') and Kho's affidavit ('encl 16') in opposing this application were not the same grounds as those stated in the said statutory declaration which was affirmed in support of her application for the said caveat and thus the defendant is not allowed to rely on the 'new' grounds. In any event this court also finds that the 'new' grounds relied upon, are bare allegations, equivocal and lacking in precision.

[12] In support of this court's findings that defendant is not permitted to adduce and rely further grounds other than what was stated in the said statutory declaration, this court is guided by the following cases:

(a) in *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437, the Court of Appeal held, inter alia, as follows:

> Taking the former contention — the stance that the document in question was an agreement — was clearly not the basis upon which he had entered the caveat. Here is a case of a caveator entering his caveat upon one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground not stated in Form 19B. This, quite apart from being impermissible, also demonstrates the hopelessness of the caveator's claim to the titles.

(b) in *Law Pik Tai @ Lau Paik Tai v Wong Nyiik Foon @ Wong Nyiik Kiew (f)* [2002] MLJU 263; [2002] 4 CLJ 486, Skinner J (as he was then) held, inter alia, as follows:

> Counsel for the plaintiff objected to the defendant's attempt to rely on her affidavits at this stage of the enquiry as her claim to an interest in the said lands as stated in her statutory declaration is merely that the said lands are matrimonial assets and her claim is by virtue of the Act. It is his submission that it is not permissible for the defendant in the instant application in order to sustain her caveat to rely on any other basis such as an implied trust through her allegations of her contribution in the payment of the premiums to the state government for the alienation of the said lands to the plaintiff, which were not stated in her caveat or her statutory declaration and neither was any mention made therein of the fact that the plaintiff held the said lands on any kind of trust for her benefit.
>
> *I find merit in the contention of counsel for the plaintiff*. In the first place, s 174(1) of the Sarawak Land Code requires that every caveat 'shall state with sufficient certainty the nature of the estate or interest claimed' and 'how it is derived from the proprietor'. In the second place, the court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* has every clearly laid down that at the first stage of enquiry, the court is to examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. In *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437; [1997] 1 CLJ 77 the caveator based his claim to caveatable interest on a document which he described as an 'option' to purchase certain land. However, there was no sale and purchase agreement either negotiated or executed by the parties In the affidavit filed to oppose an application for removal of the caveat, the caveator alleged that document concerned was an agreement made. The caveator also went on to say that if the document was to be construed as an option, then, he had duly exercised it. The High Court allowed the caveat to remain. The Court of Appeal in allowing the appeal by the caveatee held that because the basis of the caveator's claim to the interest in land stated in the caveat rested on an option, it was for him to satisfy the court that he had exercised the option in the manner prescribed therein, or that he had been prevented by the

caveatee from doing so. It was not open to the caveator to contend that the document concerned was not an option but an enforceable agreement. *The court held that it was not permissible for a caveator entering his caveat upon one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground*. (Emphasis added.)

[13] In the light of this court's above findings, this court thus finds that the defendant has failed to prove the grounds stated in the said statutory declaration that she had derived her estate or interest from the plaintiff who was/is the actual registered proprietor of the said property. From the evidence adduced by the defendant, it showed that it was the said William Hardin who purportedly promised that the defendant and her husband can stay at the ground floor of the said property for as long as they like. However as stated earlier, the registered proprietor of the said property at all material times was the plaintiff, not the said William Hardin.

[14] This court also finds that the defendant has failed to state with sufficient certainty in the said caveat as to the specific estate or interest claimed by the defendant against the plaintiff and/or the said William Hardin.

[15] Section 174(1) of the Sarawak Land Code (Cap 81) clearly provides that:

> 174(1) Every caveat shall be signed by the caveator, or by his attorney or agent, and *shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor*. It shall also appoint a place, or give an address, within Sarawak at or to which notices and proceedings relating to the caveat may be served or addressed.

[16] Further from the contents of the said statutory declaration, this court finds that the defendant's purported interest in he said property, if any, is in the ground floor of the said property. However the defendant has caveated the whole property without limiting the effect of the said caveat, to protect the part of the said property which she alleged, she was entitled to, namely the ground floor of the property. In paras 8, 9 and 10 of the said statutory declaration, the defendant averred as follows:

> 8. ... *But Hardin did not allow us to move out. He offered us to exclusively live in the ground floor of the said Property as long as we liked. He asked us to put up the necessary walls, construct and complete a kitchen, bathrooms and toilets and other necessary works in order to make the ground floor habitable*.
>
> 9. My Husband and I thereupon started at our costs and expenses carrying out the requisite works to the said Property in order to make it habitable. We had spent a total sum of Ringgit Malaysia five hundred thousand (RM500,000) for the work.
>
> 10. My Husband and I and our four sons *had at all material times been living in the*

A *ground floor of the said Property*. I am still living there after the demise of My Husband. My Husband passed away on 20th February 2009. (Emphasis added.)

[17] Thus it is clear that the defendant is contending that she is entitled to live exclusively in the ground floor of the said property for as long as she and her husband like. In the premises, the defendant is not claiming estate or interest in the whole of the said property which also consisted of the first and second floors of the said property.

[18] It is also clear that the said caveat lodged by the defendant was not to prohibit any dealing in respect of the ground floor of the property only but against the whole of the said property. The said caveat did not limit the effect of the said caveat to the ground floor of the property, 'to protect her interest'.

[19] In *Fung Yuk Lien v Foong Chee Sam (as administrator of the estate of Kong Muk Tei, deceased)* [2000] 3 MLJ 543, Tee Ah Sing J (as he was then) held, inter alia, as follows:

> Under s 173(a) of the Land Code, any person claiming to be entitled to or to be beneficially interested in any land, estate or interest under the Land Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever may at any time lodge with the Registrar a caveat in Form Q in the first schedule.
>
> Section 174(1) of the Land Code reads as follows:
>
> > Every caveat shall be signed by the caveator, or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor. It shall also appoint a place, or give an address, within Sarawak at or to which notices and proceedings relating to the caveat may be served or addressed.
>
> I am of the view that the words 'shall state with sufficient certainty the nature of the estate or interest claimed by the caveator' in s 174(1) of the Land Code is a mandatory provision. *Thus, the caveator must specify the nature of the claim whether it is in respect of the whole land or a portion of it.*
>
> The interest of the plaintiff in the present case before me *as alleged by her extended to only half a portion of the said land. However, in the caveat instrument, the caveat was expressed to bind the whole of the said land.*
>
> In our case the plaintiff should only caveat a portion of the said land and not the whole of the said land. However, since the plaintiff has caveated the whole of the said land she should have followed the procedure as stated in *Chor Phaik Har v Farlim Properties Sdn Bhd* where His Lordship Edgar Joseph Jr FCJ (delivering the judgment of the Federal Court) at p 35 said:
>
> In other words, we would answer the question arising upon the preliminary point of law in favour of the appellant caveator; that is to say, that the proviso to s 322(1) is

purely declaratory of the principles enunciated in *Vangedaselam*.

In particular, we endorse the following passages in the judgment of Suffian LP in *Vangedaselam*.

On the scope of ss 322, 323 and 324, His Lordship said [1976] 2 MLJ 161 at pp 162–163):

> I am of the opinion ... you either caveat the whole land or not at all, *and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim*.

I am of the view that under s 174 of the Land Code a person who claims an interest in a specific portion of land may caveat the whole land provided that the effect of the caveat is to cover the particular interest claimed.

In our case, however, the plaintiff caveated the whole of the said land without expressly stating that it was to protect her limited interest in the said land only.

In my view the caveat contained a serious defect in failing to comply with the mandatory requirement of s 174(1) of the Land Code. I am of the view that her entry of the caveat against the whole of the said land was, therefore, null and void and of no effect. (Emphasis added.)

[20] Further in *N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161, Suffian LP speaking for the Federal Court stated, inter alia, as follows:

I am of the opinion that under that Code also, you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion *you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.*

...

With respect, my construction of these provisions of the National Land Code is as follows a person who claims a registrable interest in land wishes to enter a private caveat. He must according to sub-section (2) of section 323 apply by Form 19B. *In that form (verified by a statutory declaration) he must specify the nature of the claim on which his application is based and whether the caveat is to be expressed to bind the land itself or a particular interest only.*

...

In the ordinary case a proprietor owns all the interest in his land, but this interest is divisible; thus in the instant case the caveatees owned (a) all the interest in Merah Estate excluding the portion claimed by the caveator, as well as (b) all the interest in that portion. The caveator, as it happens, claims not the caveatees' interest in the entire estate, but only his interest in the portion in question. In other words he claims a particular interest in the land. *In that event when applying for entry of a caveat he should so state in Form 19B in paragraph 1, and in paragraph 2 he should give the grounds of his claim. (He should not claim a caveat to be expressed to bind the land itself.) He should also cause to be inserted in Form 19A a description of the particular interest claimed and a description of the effect of the caveat.* (Emphasis added.)

[21] In *Easow Plantations Sdn Bhd v Mosbert Berhad (In Liquidation) Ranjit Singh v Jet Age Construction Sdn Bhd* [1988] 1 MLJ 298, the plaintiff, Easow Plantations Sdn Bhd purchased some sublots from a company called Module Construction. The registered proprietor was the defendant, Mosbert Bhd. The application for the caveat did not state how Module Construction obtained its interest in the land. The Federal Court held, inter alia, as follows:

> In Civil Appeal No 40 of 1987, the caveat was lodged by a company called Easow Plantation Sdn Bhd in respect of 26 sublots with a total area of 156,000 sqft. The application by the liquidator to have the caveat removed was allowed by Shankar J. The ground given by the learned judge was that he was bound by the decision of the Supreme Court in *Mosbert Berhad (In Liquidation) v Stella D'Cruz* [1985] 2 MLJ 446. According to this case, a person claiming only a portion of a piece of land should caveat only a portion of it and if he caveats the whole land such caveat is void and is of no effect.
>
> According to the caveat entry application by *Easow*, the caveat was limited only to the area of the 26 sublots which it claimed, ie 156,000 sqft. and not the whole land area, which is 113a 2r 20p. Therefore, the application of the *Stella D'Cruz* case should end in Easow's favour. *However, there is one material question which Easow had to surmount, in that under s 323 sub-s (2), it has to state the nature of the claim on which the application is based. In its caveat entry application (Form 19B), Easow claimed the 26 sublots by virtue of an assignment it took from another company called Module Construction Sdn Bhd The application, however, did not say how Module Construction obtained its interest in the land. There is simply no connection between Module Construction and the purchaser or Mosbert Bhd. Since the land is vested in Mosbert Bhd, this missing link, in our view, does not satisfy the requirement of s 323 sub-s (2)*. Hence the conclusion reached by the learned judge is unassailable. We therefore dismiss the appeal with costs and order the deposit to be paid to the respondents towards taxed costs.

[22] Since the defendant has caveated the whole of the said property, without limiting the effect of the said caveat to the defendant's alleged interest or estate in this case, that is the ground floor of the property, the said caveat is thus null and void.

[23] This court finds that the contentions of the defendant contained in the said statutory declaration and the various affidavits filed are without merits and mala fide and do not warrant further investigations as to their truth on the following grounds:

(a) it is factually wrong for the defendant to allege that the late William Hardin was the registered proprietor when in fact the plaintiff was the registered proprietor for valuable consideration since 26 August 1977; and

(b) the contentions of the defendant is equivocal, lacking in precision and inconsistent:

(i) there is only a bare statement of the works done on the ground floor without any documentary evidence of any kind in support;

(ii) there is also a bare statement on the expenditure of RM500,000 without the production of any receipts or vouchers nor there was any attempt to give a precise or a proper description of as how the sum of RM500,000 was spent; and

(iii) the constant shifting of grounds relied upon by the defendant in opposing this application.

[24] This court is guided by the case of *Utama Merchant Bank Bhd v Cawis Wira Sdn Bhd & Ors* [2006] 7 CLJ 143, Abdul Wahab Patail J (as he then was) held that:

> In an affidavit based application, it is not enough to assert a fact in an affidavit. An assertion is not evidence. When an assertion is disputed, the onus lies upon the maker of that assertion to tender his evidence in a further affidavit, if he has not done so in his earlier affidavit where the assertion was made. In such case, the plaintiff: (a) in the case of documentary evidence, must tender such evidence by exhibiting the same; or (b) in the case of witness evidence, to set out the nature of his evidence that supports his assertion, in his affidavit.

[25] In *Eng Mee Yong & Ors v Letchumanan*, the Privy Council stated as follows:

> Nevertheless Their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued ex parte by the Registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all. Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.
>
> ...
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> ...
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> *Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it maybe. In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima*

facie plausibility to merit further investigation as to their truth. (Emphasis added.)

[26] In the light of this court's above findings and since the said caveat is null and void, this court thus holds that the defendant has failed to prove that she has a caveatable interest in the said property. Thus the defendant has failed to satisfy the first test of the three stages approach laid down by *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor*.

Second stage: any serious question meriting a trial? And third stage: balance of convenience

[27] Since this court finds that the defendant has no caveatable interest in the said property, there is thus no necessity for this court to proceed to consider the second and third tests laid down by the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* that is whether there are serious question to be tried and where the balance of convenience lies.

ORDER

[28] In the light of this court's above findings, this court finds that there are merits in the plaintiff's application. In the premises, this court thus grants an order in terms of the plaintiff's application with costs.

Plaintiff's application allowed with costs.

Reported by Kohila Nesan